No. 93-795

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BLUE CROSS/BLUE SHIELD OF CONNECTICUT,
Petitioner,
vs.
INTER VALLEY HEALTH PLAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.5, Petitioner Blue Cross/Blue Shield of Connecticut ("Blue Cross") hereby submits this reply brief in support of its Petition for Writ of Certiorari:

SUMMARY OF ARGUMENT

Respondent advances three primary arguments in opposition to the Petition for Writ of Certiorari: (1) California's coordination of benefits ("COB") regulations follow the majority of state law regulations, as set forth in the model code adopted by the National Association of Insurance Commissioners ("NAIC"); (2) the application of local state regulations will not impair the legislative goals of ERISA; and (3) purported differences between ERISA plan beneficiaries of divorced and

married parents necessitate a departure from existing federal common law.

Each of Respondent's arguments runs contrary to existing law. First, California departs from the NAIC Model Code, for Respondent would be responsible for primary coverage under the NAIC regulations. Second, the appellate court's decision turns back the clock to the chaos which preceded ERISA, subjecting employee benefit plans to inconsistent state insurance regulations and, based on the California rule, the entire body of family law throughout all fifty states. Third, the ERISA statute precludes plan participants from modifying or amending a plan with a divorce decree. For these reasons, Petitioner respectfully requests the Court to grant certiorari in this case.

I.

THE APPELLATE COURT DECISION CONFLICTS SQUARELY WITH THE LEGISLATIVE INTENT AND STATUTORY LANGUAGE OF ERISA.

A. California Regulations Differ From The NAIC Model Code.

Respondent contends that California's COB regulations follow the NAIC Model Code. The plain language of each respective regulation refutes this argument. According to the NAIC Model Code, benefits of a dependent child of separated or divorced parents are determined first for the parent with custody of the child. National Ass'n Ins. Comm'r, Group Coordination of Benefits Model Reg. § 5(3)(a). The specific terms of a court decree may determine primary responsibility for a

child's health care expenses only if the benefit plan of that parent "has actual knowledge" of the decree's terms, otherwise the parent with custody (and his or her benefit plan) will be responsible for primary coverage. *Id.* at § 5(3)(d). By contrast, California has omitted the actual knowledge requirement from its regulation. 10 Cal. Code Reg. § 1300.67.13(b)(4)(E).

The distinction between the California and NAIC regulations becomes critical under the rule advanced by Respondent and the state court of appeal. Anjanette Farace was and remains in the custody of her mother. As Respondent concedes in its opposition, Inter Valley Health Plan was unaware of any divorce decree between Anjanette's parents and paid medical expenses to Children's Hospital of Orange County without actual knowledge of the decree. Although Respondent arguably would not be primarily liable for Anjanette's medical expenses under California law, there can be no doubt that Respondent would have lost this case if the appellate court had followed the NAIC Model Code.

Contrary to Respondent's arguments in opposition to this Petition, the appellate court departed from the NAIC Model Code and opted for a local regulation. As a result, California now stands alone: ERISA plans may not follow the NAIC Model Code, nor the birthday rule,[1] nor the rule of Solomon.[2] Multistate employee benefit plans[3] are once again subject to the patchwork

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[1] *See PM Group Life Ins. Co. v. Western Growers Assur. Trust*, 953 F.2d 543, 547-48 (9th Cir. 1992).

[2] *See, e.g., Winstead v. Indiana Ins. Co.*, 855 F.2d 430, 433-34 (7th Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S.Ct. 839, 102 L.Ed.2d 971 (1989).

[3] The St. Francis Hospital Health Plan is located in Connecticut, as is its stop loss insurer, Blue Cross.

regulation which preceded ERISA, with its inherent administrative inefficiencies and incentives for forum-shopping.

B. The Appellate Court Exceeded Its Authority To Fashion A Federal Common Law Rule By Abandoning ERISA's Legislative Goals.

After concluding that ERISA preempted California's insurance regulations and authorized the adoption of a federal common law rule for COB determinations, the appellate court opined that federal common law is not "uniform" until the Supreme Court issues an opinion. *Inter Valley Health Plan v. Blue Cross/Blue Shield*, 16 Cal.App.4th 60, 19 Cal.Rptr.2d 782, 786 (1993). Yet the absence of a Supreme Court opinion cannot bestow unfettered discretion on state courts to adopt local laws disguised as federal common law, particularly when Congress preempted an entire field as an exclusively federal concern. *Cf., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987). Although Congress intended for courts to fashion a body of federal common law to govern ERISA actions, courts do not have "carte blanche authority" to apply any prevailing state law to ERISA actions. *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986). Indeed, state laws may be used as the basis of federal common law only if they are consistent with the policies underlying ERISA. *Id.*, 805 F.2d at 961; *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1440 (9th Cir. 1990). The question raised by Respondent's opposition is whether the appellate court's decision comports with the legislative goals of ERISA. It does not.

Congress enacted ERISA to protect employers from conflicting and inconsistent state and local regulation of employee benefit plans. *Shaw v. Delta Airlines*, 463 U.S. 85, 90-91, 103 S.Ct. 2890, 2896-97, 77 L.Ed.2d 490 (1983); *Pilot Life*, 481 U.S. at 46, 107 S.Ct. at 1552. Rather than following the birthday rule, the rule of Solomon,[4] or the NAIC Model Code, the appellate court applied local insurance regulations, as it would have prior to the enactment of ERISA. Now, not only is an employee benefit plan subject to state and local regulations, it must also analyze and obey individual divorce decrees, coupled with the child custody and marriage dissolution laws of all fifty states.[5] This provincial policy demonstrates a conscious disregard for ERISA's legislative goals and will undoubtedly complicate the administration of ERISA plans, which employers might offset with decreased benefits to employees. *Cf.*, *FMC Corp. v. Holliday*, 498 U.S. 52, 60, 111 S.Ct. 403, 408, 112 L.Ed.2d 356 (1990).

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[4] Although the appellate court criticized the birthday rule at length, it failed to justify a departure from the rule of Solomon.

[5] Again, the appellate court looked no further than California law to resolve the question of financial responsibility under the Farace's divorce decree. *Inter Valley*, 19 Cal.Rptr.2d at 788-89.

C. By Relying On A Divorce Decree To Determine Employee Benefits, The Court Of Appeal Permitted Employees To Modify A Plan In Contravention Of ERISA's Writing And Amendment Requirements.

Even if California's COB regulations comport with ERISA's legislative goals, permitting plan participants to modify a plan through a divorce decree violates ERISA's writing and amendment requirements. "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C § 1102(a)(1). Such a written instrument must also provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan. 29 U.S.C. § 1102(b)(3). As a result, employee benefit plans are not bound by informal, unauthorized amendments to the plan. *Bellino v. Schlumberger Tech., Inc.*, 944 F.2d 26, 33 n.8 (1st Cir. 1991).[6] Likewise, oral amendments or modifications to a plan contradict the writing requirements of Section 1102 and are, therefore, unenforceable. *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992).[7] The

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[6] *See also Hamilton v. Air Jamaica*, 945 F.2d 74, 77 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1479, 117 L.Ed.2d 622 (1992); *Pizlo v. Bethlehem Steel*, 884 F.2d 116, 120 (4th Cir. 1989).

[7] *See also Alday v. Container Corp.*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 (3d Cir. 1990); *Cefalu v. B.F. Goodrich, Co.*, 871 F.2d 1290, 1296 (5th Cir. 1989); *Musto v. American Gen. Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1264-66 (10th Cir. 1988).

writing and amendment requirements of Section 1102 protect the actuarial integrity of the plan and prevent fraudulent collusion or side agreements between employers and individual plan participants. *Cefalu*, 871 F.2d at 1296; *Cummings v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 388 (7th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 648, 93 L.Ed.2d 703 (1986). To hold otherwise would not only thwart congressional purpose and intent, but also afford less protection to employees and their beneficiaries. *Cefalu*, 871 F.2d at 1296.

Federal common law does not provide a back door to evade ERISA's writing and amendment requirements. California's COB regulations conflict squarely with Section 1102 of ERISA and, therefore, cannot become a rule of federal common law. In essence, the California regulation permits plan participants to apportion liability through an unauthorized private side agreement. Such a scenario is antithetical to the policies of ERISA: individual participants could deplete plan benefits without regard to the shared interests of fellow employees, the plain language of the plan, or substantive ERISA law. In short, the rule adopted by the appellate court as federal common law should, itself, be preempted as a state law which directly relates to employee benefit plans.

CONCLUSION

After comparing the appellate court opinion with substantive ERISA law, it appears that the purported distinction between children of married and divorced parents is simply a pretext for applying state and local regulations. Accordingly, Petitioner respectfully requests that the Court grant certiorari and adopt a uniform rule for ERISA coordination of benefit determinations.

Dated: January 7, 1994.

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